IN THE

Supreme Court of the United States.

THE MIDDLETOWN NATIONAL BANK,
Complainant-Appellant,

vs.

TOLEDO, ANN ARBOR AND NORTH MICHIGAN RAILWAY COMPANY *et al.*,
Defendants-Appellees.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR DEFENDANT CLEWS AND OTHERS.

Statement of Facts.

This cause comes here on a certificate from the United States Circuit Court of Appeals for the Second Circuit. The complainant, a creditor of the railway company, defendant, a corporation of the State of Ohio, having recovered a judgment in the Supreme Court of the State of New York, upon which execution was issued and returned unsatisfied, brought its bill in equity, for the benefit of itself and other creditors, against numerous stockholders of the railway company defendant resident in the dis-

trict, to enforce the liability of such stockholders for debts of such company under the laws of Ohio, making such company also a party defendant. Defendants demurred, and the Circuit Court sustained the demurrer, on the ground that the action did not comply either with Section 3260, R. S., Ohio, as it stood after the amendment of 1894, inasmuch as all the stockholders were not made parties defendant, nor did it comply with the amendments of the statute passed in 1900.

The liability sought to be enforced was created first by the Constitution of Ohio (1851), Article XIII., Section 3, as follows:

> "Dues from corporations shall be secured by such individual liability of the stockholders and other means, as may be prescribed by law; but in all cases each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock."

In pursuance of this provision of the Constitution the Legislature adopted statutory provisions with respect to the stockholders of certain corporations of which Section 3260, *infra*, was one. It was further provided by Section 3258, R. S., 1880, as follows:

> "The stockholders of a corporation which may hereafter be formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation" (Ohio R. S., Sec. 3258).

The bill was filed in 1899, at which time Sec. 3260, R. S., Ohio, as amended in 1894, provided as follows:

> "A stockholder or creditor may enforce such liability by action jointly against all the holders or owners of stock, which action shall

be for the benefit of all the creditors of the corporation, and against all persons liable as stockholders; and in such action there shall be found and determined the amount payable by each person liable as a stockholder on all the indebtedness of the corporation, in which adjudication no costs shall be taxed to nor collected of any stockholder to an amount which, together with the amount to be paid on said indebtedness, will exceed the amount of the stock on which he is liable, provided, that in any such action the plaintiff may file in the court a sworn statement that a stockholder or stockholders or the legal representatives of a deceased stockholder have not been summoned, giving their residence if known; and that it is impracticable to secure service of summons upon such stockholders or such legal representatives of a stockholder, and remitting from the claims of the plaintiff or of other creditors consenting, so much as may be found payable by such stockholders not served with summons except those who may be insolvent or non resident of the State, and judgment shall be rendered against the stockholders who have been served with summons for the *pro rata* amount for which they would be liable if all solvent stockholders resident of the State were served with summons; and when a creditor has prosecuted against a corporation an action of (at) law begun before any action to enforce the stockholders' liability, and has recovered final judgment only after such an action to enforce the stockholders' liability has been prosecuted to a final decree in the court in which the action was commenced, such judgment creditor may bring a like action against the stockholders of the corporation to enforce such judgment at any time within four years after the recovery of his said judgment, but the stockholders shall not be liable for any amount in excess of that provided in Section 3258" (Ohio R. S., Sec. 3260).

Afterwards, in 1900, but before the filing of the second amended bill of complaint, the section was further amended and supplemented as follows:

"AN ACT TO AMEND AND SUPPLEMENT SECTION 3260 OF THE REVISED STATUTES OF OHIO.

Be it enacted by the General Assembly of the State of Ohio:

SECTION I.—That Section 3260 of the Revised Statutes of Ohio be amended and supplemented so as to read as follows:

> "Section 3260.—Whenever any creditor of "a corporation seeks to charge the directors, "trustees, or other superintending officers of "a corporation, or the stockholders thereof, "on account of any liability created by law, "he may file his complaint for that purpose "in any *common pleas court* which possesses "jurisdiction to enforce such liability"

Section 3260 (*a*)—

> "The court shall proceed thereon, as in "other cases, and, when necessary, shall "cause an *account* to be taken of the prop- "erty and obligations due to and from such "corporation, and may appoint one or more "receivers."

Section 3260 (*b*)—

> "If, on the coming in of the answer or "upon the taking of such account, it appears "that such corporation is *insolvent*, and has "not sufficient property or effects to satisfy "such creditor, the court may proceed to as- "certain the respective liabilities of the "directors, officers and stockholders, and en- "force the same by its judgment, as in other "cases."

Section 3260 (*c*):

> "In all cases in which the directors or other "superintending officers of a corporation, or "the stockholders thereof, are made parties "to an action in which a judgment is ren- "dered, if the property of such corporation is "insufficient to discharge its debts, *the Court*

" *shall give notice to non-resident stockhold-*
" *ers, as provided in sections 5048, 5049, 5050*
" *or 5052 of the Revised Statutes*, and shall
" first proceed to compel each stockholder to
" pay in the amount due and remaining un-
" paid on the shares of stock held by him, or
" so much thereof as is necessary to satisfy
" the debts of the company."

Section 3260 (*d*):

" If the debts of the company remain un-
" satisfied the Court shall proceed to ascertain
" the respective liabilities of the directors or
" other officers and of the stockholders, and
" to adjudge the amount payable by each, and
" enforce the judgment as in other cases.
" *The Court may authorize and direct the Re-*
" *ceiver to prosecute such action in his own*
" *name as receiver, as may be necessary, in*
" *other jurisdictions to collect the amount*
" *found due from any officer or stockholder.*"

Section 3260 (*e*):

" Whenever any action is brought against
" any corporation, its directors or other su-
" perintending officers, or stockholders, ac-
" cording to the provisions of this chapter, the
" Court, whenever it appears necessary or
" proper, may order notice to be published in
" such manner as it shall direct, requiring *all*
" *creditors of such corporation to exhibit*
" *their claims* and become parties to the ac-
" tion within a reasonable time, *not less than*
" *six months* from the first publication of
" such order, and, in default thereof, to be
" precluded from all benefit of the judgment
" which shall be rendered in such action, and
" from any distribution which shall be made
" under such judgment."

Section 3260 (*f*):

" Upon a final judgment in any such action
" against an insolvent corporation, the Court
" shall cause a just and fair distribution of
" the property and assets of such corporation
" or the proceeds thereof to be made among
" its creditors."

SECTION II.—"That said Section 3260 be, and hereby is repealed."

SECTION III.—"*This act shall apply to pending actions and shall take effect and be in force from and after its passage.*"

Passed April 16, 1900.

On the above state of facts the instruction of the Supreme Court is requested:

FIRST.—Whether Article XIII., Section 3 of the Constitution of Ohio, is so far self-executing that it may be enforced outside of the jurisdiction of said State without compliance of said requirements of Section 3260 of the Revised Statutes of said State, as amended in 1899.

SECOND.—Whether Article XIII., Section 3 of the Constitution of Ohio, is so far self-executing that it may be enforced outside of the jurisdiction of said State without compliance with said requirements of Section 3260 of the Revised Statutes of said State, as amended in 1900.

The Questions before the Court.

The two questions certified raise several points. The main one, naturally is whether the Constitution and statutes both before and after the amendment of 1900 form one body of law. If answered negatively, then the complainant's bill is bad, as he did not sue "all" the stockholders as required by the statute. The complainant did not bring his suit first in Ohio, the domicile of the corporation and against all the stockholdues, but brought his action in New York against part of the stockholders only. The complainant's argument rests on the claim that the liability created by the Constitution is contractual and therefore self-executing, and that the Ohio statutes providing a remedy

merely mean for local actions against resident stockholders, that this remedy is not exclusive. Complainant says in other words that as the liability is fixed by the Constitution, this must be, and always has been enforced in Ohio and elsewhere irrespective of the local remedy provided by the Ohio statutes. The defendants do not question so much the liability under proper provisions as the methods used to enforce it. They see no reason why some stockholder representing large Wall street interests should be selected and sued instead of all, and demand the same protection as given to Ohio stockholders, that is, a suit in Ohio against all the stockholders. The defendants claim as the liability carries a remedy that alone must be followed. If the remedy is hard to enforce, that is a matter for the Ohio Legislature to regulate, but such as it is the defendant pleads its protection.

The question actually certified, whether the Ohio Constitution is self-executing irrespective of the statutory requirements, demands an inquiry as to what are the decisions and statutes in Ohio concerning this liability, what has been decided in other jurisdictions as to the Ohio law, what are the general equitable principles governing? We urge that the question certified should be answered affirmatively, because

FIRST.—The Constitution and statutes of Ohio must be taken together as making one body of law.

SECOND.—The complainant should pursue the ordinary remedy by an original suit in Ohio.

THIRD.—The practice under the Ohio laws and decision was not followed.

FOURTH.—The amendment of 1900 must be followed.

POINT I.

The Constitution and statutes of Ohio must be taken together as making one body of law.

The complainant relies solely on the claim that the stockholder's liability in Ohio being created by the Constitution is self-executing. They argue that as the Constitution itself provided no remedy the liability will be enforced on general rules irrespective of the remedies provided by the Ohio statutes. The Ohio statutes required suit to be brought against *all* the stockholders of the corporation in Ohio, but the appellant sued only some in the State of New York.

The Ohio Constitution on its face evidently contemplated that the Legislature should frame further laws to make this liability declared effective, for it specifically mentions that

> "Dues from corporations shall be secured by such individual liability of the stockholders, *and other means, as may be prescribed by law.*"

Here is a positive, specific authority, and command to the Legislature to take up the whole subject of stockholders' liability. And as the Legislature did act from time to time, did "provide other means," how can these acts of the Legislature be disregarded? Do not the statutes and Constitution make one body of law? Of course the Constitution is the supreme source and must be given effect, but it is not claimed that the Ohio statutes are unconstitutional. There is no magic in the Constitution to make laws passed in pursuance thereof nugatory. As was recently pertinently declared by this Court:

> "But this constitutional provision does not stand alone. The Legislature of Kansas has

> acted on the subject matter, and the Constitution and statutes are to be taken together as making one body of law; and it serves no good purpose to inquire what rights and remedies a creditor of a corporation might have, or what liabilities would rest upon a stockholder if either Constitution or statutes stood alone and unaided by the other."
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> Whitman *vs.* Bank, 176 U. S., 559.

The complainants confuse the terms "liability" and "remedy." It is not the liability that defendants attack but is the peculiar remedy followed in this case. Complainant argues as the liability created is contractual, it can be enforced anywhere like any other contractual liability. It is true that *some* liability has been declared by the Ohio Constitution, but this is only *in its nature contractual* (Whitman *vs.* Bank, *supra*). At first it was even argued this stockholders' liability was penal, but this is universally now held otherwise. And the Ohio courts have only recently declared such a liability in another State to be in the "nature of a guaranty" (Kulp *vs.* Fleming, 65 Ohio St., 338). What is unquestioned by all the cases is that the liability is not a common law one but is strictly statutory. Had it been a common law one it would have been self executing in the sense that all courts would provide a remedy, but being statutory it was only self-executing where the statutes creating the liability failed to provide any remedy. As we have seen, unless the statutes of Ohio, the laws of the domicile of the corporation, are to be wholly disregarded, a remedy has been provided which must be followed.

The question before this Court is not the liability but the remedy.

The decision in Whitman *vs.* Bank, *supra*, that the Federal courts will enforce the Kansas liability was given on March 5, 1900. Five days later the Supreme Court of Kansas held in Woodworth *vs.* Bowles, 61 Kansas, 587, that the provision of the

Kansas Constitution was not self-executing, so that the Bank *vs.* Whitman is not authority on the point that the Kansas Constitution is self-executing.

The complainant seeks to extend this statutory obligation. While a stockholder of an Ohio corporation may be assumed to contract with a view to the liability created by the Ohio statute, surely they contract equally with a view to the method of its enforcement prescribed by the same law, and are entitled in a court of equity to have that remedy followed. Where a specific and sufficient remedy has been provided by law, will the courts disregard this and follow such procedure as suits the whim or mere convenience of creditors?

That the liability and remedy are part of one and the same body of law has been repeatedly held.

> "In all the diversity of opinion in the courts of the different States, upon this question of how far a liability imposed upon stockholders in a corporation by a law of the State which creates it can be pursued in a court held beyond the limits of that State, no case has been found in which such a liability has been enforced by any court without a compliance with the condition applicable to it under the legislative acts and judicial decisions of the State which creates the corporation and enforces the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the State to a greater burden than domestic stockholders."
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> Bank *vs.* Francklyn, 120 U. S., 758.
> Pollard *vs.* Bailey, 20 Wall, 520.

And it is significant that in the two cases in the United States Circuit Court of Appeals where the Ohio law was construed both adopted and followed Bank *vs.* Francklyn, *supra.*

> Kirtley *vs.* Holmes, 107 Fed. Rep., 1.
> Bank *vs.* Sayward, 91 Fed. Rep., 443.

In both of these cases the Court required the remedies adopted by the State statutes to be followed. In the Sayward case it was held (p. 448):

> "The statute under consideration is quite "unlike the constitutional provision and "statute of the State of Kansas and that of "some other States, where a specific, unqual- "ified, unconditional and arbitrary remedy "at law is specified, and in respect to which "the stockholders are presumed and held to "have contracted and submitted themselves, "and where the comity or right, whichever "it may be called, that bound all stockholders "under Federal law to such statutory rem- "edy, by necessary force of logic and reason "entitled stockholders, who contract under "different conditions and different statutes "to the equitable provisions of the statute of "the State creating their liability. *The Ohio* "*statute expressly requires all the stockhold-* "*ers to be parties, and in this respect the* "*statute simply requires what the general* "*rule of equity requires, that the persons* "*interested in a subject matter in controversy* "*shall be parties.*"

This Court has recently passed on the question at length as to the liability under the Minnesota statutes, and distinctly regards the local statutes, constitution and courts as making one body of law. The claim of complainant that the Federal courts will disregard the local remedies and apply general equitable principles is wholly negatived by these cases.

Hale *vs.* Allison, 188 U. S., 56.
Finney *vs.* Guy, 189 U. S., 335.

POINT II.

The complainant should pursue the ordinary remedy by an original suit in Ohio.

The complainant could have brought his action in Ohio; that is the natural and ordinary procedure. Ohio is the State creating the liability; Ohio is the domicile of the corportion; Ohio has laws declaring the procedure to enforce the liability, and Ohio has provided courts to enforce the same. Why did not complainant then bring his suit there? Why is the Circuit Court in New York asked in the first instance to take up, examine into and determine the vast number and intricate questions involved in this suit for an account of an Ohio corporation. The burden is on the complainant to prove why the present unusual procedure should be followed—one that is certainly contrary to all precedents.

The authorities all show that suits to enforce stockholders' liabilities have always been first brought in the domicile of the corporation, and then *after the local ascertainments have been made* suit has been brought against the individual stockholder. Complainant says the Constitution of Ohio is self-executing, and that suffices. But if a liability was created that liability can and has been enforced in the Federal courts after first complying with the local statutes, decisions and requirements. The decisions all speak of these preliminary requirements as matters of course: this is the first time the Ohio local ascertainment have been disregarded and the liability is sought to be enforced directly.

In the recent cases in the Supreme Court where stockholders in Kansas corporations were sued to enforce in other States than Kansas their statutory

liability, the preliminary requisites of the Kansas statutes had first been followed.

Whitman *vs.* Bank of Oxford, 176 U. S., 559.

Hancock Nat. Bk. *vs.* Farnum, 176 U. S., 640.

Evans *vs.* Nellis, 187 U. S., 271.

And in the recent cases brought to enforce the Minnesota stockholders' liability, all of the elaborate provisions of the Minnesota statutes as to local prodcedure had first been followed, and were held necessary to be followed in Minnesota. These cases are especially interesting because the Minnesota law is the same as the Ohio law, as amended in 1900.

See Hale *vs.* Allison, 188 U. S., 56, where only 23 out of 500 stockholders were residents of Minnesota. In Hale *vs.* Hardon, 95 Fed. Rep., 747, where this same Minnesota statute was enforced in Massachusetts after bringing original suit in Minnesota, it was said:

> "To enforce extraterritorially the individual stockholder liability created by the statute * * * it is incumbent upon plaintiff to show that the ascertainments intended by the statute have been made."

To the same effect:

Finney *vs.* Guy, 189 U. S., 335.

Elkhart *vs.* N. G. Loan Co., 87 Fed. Rep., 252.

As one of complainants' reasons for declaring the Ohio Constitution to be self-executing irrespective of the statutes is that the liability must have a remedy and be enforced, it is interesting to see the courts enforcing similar liabilities repeatedly *after* the statutes have first been complied with. Indeed, in the two Ohio cases before the United States Circuit Court of Appeals, the requirements of the Ohio

statutes had first been followed. In Kirtley *vs.* Holmes, 107 Fed. Rep., 1, the Receiver of an Ohio corporation sued a Kentucky stockholder in Kentucky and recovered on the express ground that § 3260 R. S. of Ohio should be followed and contemplated holding non-resident as well as resident stockholders liable. The opinion by Mr. Justice Day is important.

In State Nat. Bk. of Cleveland *vs.* Sayward, 86 Fed. Rep., 45; affirmed, 91 Fed. Rep., 443, a creditor of an Ohio corporation sued some of the stockholders who resided in Massachusetts, and the Court expressly applies the statute.

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> "With a single creditor and a part of the stockholders as the only parties to this proceeding, it was not within the province or power of the courts below to make the ascertainments and afford the equitable relief contemplated by the Ohio statute, and, therefore, the bill was properly dismissed."

POINT III.

The practice under the Ohio laws and decisions was not followed.

It is important to examine the Ohio decisions and see how the local courts have construed this constitutional provision? That the Constitution did create a liability was settled as early as 1866, where it was held, in *Wright* vs. *McCormick*, 17 Ohio St., 87, as the Constitution had provided no remedy, the courts would enforce the liability in an equitable action brought for the benefit of all the creditors and againts all the stockholders. And in the leading case in Ohio it was held that where a suit was against part

of the stockholders the defendants had the right to bring in all the other stockholders.

> "The liability on the part of the stockholders is several in its nature, but the right arising out of the liability is intended for the common and equal benefit of all the creditors. The suit of a creditor under this statute should, in our opinion, be for the benefit of all the creditors, and the stockholders whose liability is sought to be enforced have the right to insist on their co-stockholders 'being made parties for the purposes of a general account, and to enforce from them contribution in proportion to their shares of stock.' * * * The corporation ought to have been a party but the omission was not made an objection."
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> Umsted *vs.* Buskirk, 17 Ohio St., 114.

This case has been followed in numerous others and shows the Ohio courts interpreted the constitutional liability as enforcible in one proceeding for the purpose of a general account in which the corporation, all the creditors and all the stockholders were parties. Under this precedent how can a satisfactory general account of an Ohio corporation be had in New York with only part of the stockholders as parties?

The next few cases in Ohio followed Umsted *vs.* Buskirk, *supra*, and were brought against all the stockholders.

> Brown *vs.* Hitchcock, 36 Ohio St., 667.
> Wheeler *vs.* Faurot, 37 Ohio St., 26.
> Bullock *vs.* Kilgour, 39 Ohio St., 543.
> Hawkins *vs.* Furnace Co., 40 Ohio St., 513.

So far, then, we find nothing to show that the liability in Ohio was deemed so far self-executing as to make individual stockholders liable except in a common suit against all in a court of equity.

We now come to Mason *vs.* Alexander, 44 Ohio St., 325, on which complainant lays much stress.

It was about this time that Section 3260 R. S., Ohio, was passed but as it was enacted after the commencement of the suit the Court did not apply or construe it. The record shows that the original suit in 1877 was brought in the Court of Common Pleas against all the stockholders (p. 321); that the matter was sent by consent to a referee and finally appealed to the District Court. In the District Court in 1881 it was sent to a referee (p. 320), but hearings were not begun until 1883. Then at an adjourned hearing the objection was first made that one Fuller, the assignee of a stockholder, Blossom, and that the executor of Senter estate having died the Senter estate were not parties and should be made so (p. 321). The District Court thereupon ordered both be made parties by supplemental petition and summons (pp. 322, 323).

On this state of facts the Supreme Court held there were laches, and said the action should not be delayed further so as to bring in the additional parties since the defendants themselves had failed for some years and several terms of court to raise the objection. The Court then added that in view of the facts as found no prejudice was done. Mason *v.* Alexander cites with approval Umsted *v.* Buskirk, and does not attempt to alter the law or declare any new principle; it merely applies certain principles to the special facts before it. Mason *v.* Alexander recognizes and follows the procedure theretofore adopted, that this liability was to be enforced by an equitable action in the nature of an accounting. It recognizes that all necessary parties must be before the Court, but for special reasons did not sustain the objection made before it.

The Act of 1880.

Up to this time the Ohio Courts had enforced the constitutional liability in a proceeding in the nature of an accounting.

In 1880 the first statute providing a remedy was

passed. Let us see if this affected the liability as it existed purely under the Constitution.

Section 3260, R. S., 1880, provided:

> "A stockholder or creditor may enforce such liability by action jointly against all the holders or owners of stock, which action shall be for the benefit of all the creditors of the corporation and against all persons liable as stockholders," &c.

This is mentioned in Ohio Corporation, 1903, as merely declaratory of the previous procedure, and, indeed, this is so, for the statute uses almost the very words of Umsted *vs.* Buskirk, *supra*, and the reported cases thereunder.

The statute and Constitution formed one body of law, as previously remarked, which must be applied together. In order for the complainant to succeed in this case he must show that this statute is independent of the Constitution, and that even before its passage the Ohio Courts did not require all stockholders to be made parties.

If the remedy provided by the statutes were inadequate or diminished in some way the liability, then the question would arise as certified to this Court. But where the Constitution and statutes are harmonious they must be enforced together.

The Ohio decisions, after the passage of Section 3260 Revised Statutes, apply the remedy, and consider the suit to be still in the nature of an accounting at the parent forum requiring all stockholders to be necessary parties.

> Bonnewitz *vs.* Van Wert County Bank, 41 Ohio St., 78.

In Harpold *vs.* Stobart, 46 Ohio St., 397, the same point was followed that there must be a comprehensive proceeding.

> Younglove *vs.* Lime Co., 49 Ohio St., 667.
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> Herrick *vs.* Wardwell, 58 Ohio St., 294.

Probably as succinct a statement of the Ohio law as any is that of Judge Spear in Kulp *vs.* Fleming, 65 Ohio St., 321:

> "True, our method of enforcing the liability of stockholders is by a proceeding in the nature of a suit in equity, which contemplates the bringing in of the corporation of all the creditors and of all the stockholders, and a decree which will adjust and finally settle the rights and liabilities of the parties."

Section 3260 R., S., was amended in 1894, when all that portion beginning with "provided" in line 14 was added. This was done because of the difficulty found in securing service of process on certain persons, and provided that where it was impracticable to make such service certain waivers might be filed. This was not done in the present case. Here, again, we see the Ohio statutes providing for a remedy in the parent forum.

The Amendment of 1900.

The Ohio remedy was further amended in 1900 when a very complete and comprehensive procedure was provided. This is based on the Minnesota statute following it nearly verbatim, except that the receivers are empowered to sue in foreign jurisdictions to meet the objections raised in Hale *vs.* Hardon, Hale *vs.* Allison, *supra.*

We thus see that Ohio has steadily progressed in providing a practical, suitable and effective remedy: First, in 1880, there was merely a general requirement that the suit be in equity and against all parties following Umsted *vs.* Buskirk; then in 1894 this was amended so as to allow for insolvent, non-resident, absent and other stockholders who might not be personally served or brought in; finally, in 1900 a complete, elaborate and effective remedy was provided, with provisions for appointing a receiver with power to sue non-resident stockholders. This being

so, will this Court disregard these statutory remedies? Can it say that any creditor can pick out some stockholders in any part of the country and there establish the whole proceeding? If suit had been brought in Ohio an adjudication would be obtained which would be following the statute, the laws of the domicile of the corporation and could be enforced in ancillary proceedings; while the liability may be contractual and may be enforced outside of Ohio, it is only *after* the preliminary, local ascertainments have been established as contemplated by the statutes. It is impossible for a court of equity to disregard these or apply any independent remedy. The liability only arises after being fully established in an equitable proceeding in nature of an accounting and this must be in forum of domicile of the corporation; while the courts are extending the enforcement of these actions, still they must guard the rights of non-resident shareholders.

The remedy provided may not suit complainant, it may be unfortunate that so many stockholders reside without the State, but as has been well said:

> "It is not necessary for us to determine the practical effectiveness or efficiency of this statutory liability and remedy in favor of the creditors, where the stockholders and creditors are distributed among the various States, or where the liability, if inoperative against same, is operative against others.
>
> "If there is a lack of efficiency in the remedy prescribed by the statute of Ohio, it would seem upon reason that the rule which would hold the stockholders to an arbitrary and anomalous remedy, on the ground of contract, should hold the creditor to an inefficient and practically inoperative remedy upon the same ground."
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> Bank *vs.* Saywood, 91 Fed. Rep., 446.

POINT IV.

The amendment of 1900 must be followed.

By the act itself, the amendment of 1900 applied to pending actions. Section 79, R. S., provides, "When the repeal relates to the remedy it shall not affect pending actions unless so expressed"; and this has been applied in

Arrowsmith *vs.* Hammering, 39 Ohio St., 573.
Palmer *vs.* State, 42 Ohio St., 596.
State *vs.* Rabbitts, 46 Ohio St., 178.

It is said the amendment of 1900 impaired the obligation of the contract. We have already discussed the matter by showing that the liability under the Constitution was at best only in its nature contractual; that where there were statutes relating to this liability these must be construed with the Constitution as forming one body of law, and that the decisions and statutes of Ohio all made the liability under the Constitution enforcible in one comprehensive proceeding in Ohio, the parent forum, in an equitable action in the nature of an accounting.

But, apart from this, the amendment of 1900 does not impair any contractual right, for the change of remedy, instead of impairing, really adds to the rights by providing an effective remedy. The remedy under Section 3260, R. S., as amended in 1900, is logical and comprehensive. The statute prescribes a single suit of an equitable nature, in which all persons within reach of the home process—creditors, corporations and stockholders—shall be made parties; in which all the assets and liabilities shall be ascertained, and the rights, equities and liabilities of all parties in interest be finally determined; and authorizes the appointment of a receiver, who may sue those without the jurisdiction of the Court.

This amendment of the Ohio statute in 1900 makes it almost similar to the Minnesota one which has been so recently before the Court. As the Court there held, the remedies provided by the Minnesota statute were exclusive, and should be followed, we see no reason why this is not controlling in the case at bar.

> "We have just decided in Hale *vs.* Allinson, 188 U. S., 56. * * * An examination of the decisions of the Minnesota courts shows that they had held that the remedy provided by the statutes of the State for the enforcement of stockholders' liability was a suit in equity in that State by a creditor in his own behalf and that of all other creditors, against all the stockholders of the corporation, or so many of them as could be served with process, and that it was exclusive, and no other remedy could be availed of even within the jurisdiction of the courts of Minnesota That being the law of Minnesota, it would, of course, prevent an action outside of the State, by a receiver as well as by any other plaintiff, to enforce the stockholders' liability."
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> Finney *vs.* Guy, 189 U. S., 335, 340.

POINT V.

Both questions certified should be answered negatively.

Dated January, 1905.

Respectfully submitted,
ARTHUR F. COSBY,
Solicitor and Counsel for defendants Clews, Feuchtwanger, Davis, Goodbody, Johnson, Kissam, McIntyre, Quincey and Walker.

[Q7595]